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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/687,336	10/16/2003	John T. Kilcoyne	1065-012US05	7853
28863 7590 04/11/2008 SHUMAKER & SIEFFERT, P. A. 1625 RADIO DRIVE SUITE 300 WOODBURY, MN 55125				
EXAMINER NGUYEN, HUONG Q				
ART UNIT 3736		PAPER NUMBER		
NOTIFICATION DATE 04/11/2008		DELIVERY MODE ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docketing@ssiplaw.com

Advisory Action
Before the Filing of an Appeal Brief

Application No.

10/687,336

Applicant(s)

KILCOYNE ET AL.

Examiner

HELEN NGUYEN

Art Unit

3736

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 14 March 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Max Hindenburg/
Supervisory Patent Examiner, Art Unit 3736

Continuation of 11, does NOT place the application in condition for allowance because: Applicant's arguments filed 3/14/2008 have been fully considered but they are not persuasive. Applicant contends that modifying Schulman et al to monitor the physiological parameter indicative of gastroesophageal reflux as a distance would render Schulman unsatisfactory for its intended purpose because if the sensors of Schulman et al sensed different values, at least one of the sensors would become disabled. However, it is noted that the independent claim only recites "monitors the physiological parameter indicative of gastroesophageal reflux as a function of distance based on the signals and the locations." There is no recitation of any required change in the parameter being measured, i.e. pH. In fact, it is believed that the lack of change in the physiological parameter would indicate the absence of gastroesophageal reflux, the sensing of which would be well within the scope of the invention for measuring physiological parameters in the body of a patient. Furthermore, even if Applicant assumes that different values would be detected, there is no evidence whatsoever that such detected difference would exceed the threshold value, i.e. 20%, and result in the disabling of the sensors. In fact, it is highly expected that such supposed changes in pH would not exceed 20% considering the very delicate nature of pH balance within the body. Thus, it is maintained that Schulman et al in combination with Brune, Ishikawa et al, and Scarantino et al still teach the invention as claimed without teaching away from the integrity checks for the sensors of Schulman et al.

Applicant also contends that there is no disclosure of a receiver that determines a location for each sensor within an esophagus based on the identifier. However, it is noted that Schulman et al already teach a receiver, that Brune teaches a receiver for determining a location of a sensor based on an identifier, that Ishikawa discloses at least determining the location of multiple sensors based on their individual identifiers, and that Scarantino et al disclose at least implanted sensors used to measure pH for gastrointestinal applications (Col.8: 58-65), which would make obvious to one of ordinary skill in the art determination of the location for each sensor when placed within the esophagus for the gastrointestinal application. Thus, it is maintained that the combination of references teaches the invention as claimed as motivated by the reasons previously elaborated.

Furthermore, it is noted that for a proper §103 rejection, "There are three possible sources for a motivation to combine references: the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art." In re Rouffet, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998). "There is no requirement that an 'express, written motivation to combine must appear in prior art references before a finding of obviousness.'" See Ruiz v. A.B. Chance Co., 357 F.3d 1270, 1276, 69 USPQ2d 1686, 1690 (Fed. Cir. 2004). For example, motivation to combine prior art references may exist in the nature of the problem to be solved (Ruiz at 1276, 69 USPQ2d at 1690) or the knowledge of one of ordinary skill in the art (National Steel Car v. Canadian Pacific Railway Ltd., 357 F.3d 1319, 1338, 69 USPQ2d 1641, 1656 (Fed. Cir. 2004))." See MPEP 2143.01. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. In re McLaughlin, 170 USPQ 209 (CCPA 1971). References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures. In re Bozek, 163 USPQ 545 (CCPA) 1969.

Therefore, it is maintained that the combination of Schulman et al, Brune, Ishikawa et al, and Scarantino et al is proper as motivated by the elaborated reasons, namely, modifying Schulman et al to include an identifier for the same purpose as taught by Brune, to determine the location of each of multiple sensors by each having an identifier as taught by Ishikawa et al, and to monitor certain parameters as a function of distance based on the signals and the location to provide more regional specific, and thus accurate, information as taught by Scarantino et al, and also expanded upon in the previous Final Rejection. It is also noted that all the references constitute analogous art as at least pertaining to the same field of endeavor, particularly, sensors implanted within the body. Furthermore, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See In re McLaughlin, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).